

NO. C [REDACTED] 8015

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE PETITION OF OSCAR
E. ADAMSON FOR A WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT
REGARING HIS AND OTHERS' PETITION FOR A WASH. OF
OSCAR E. ADAMSON, COMPLAINANT, vs. DAVID C.
CHILLAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI AND PETITION FOR
INTERLOCUTORY RELIEF

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of Counsel

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(30489)



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

NOTICE.

To DAVID C. GILLILAND and JAMES A. CARR and T. PERCY CARR, Esqs., *Roe Building, St. Louis, Mo., his Counsel:*

Please take notice that upon a copy of the transcript of the record herein, and upon the accompanying petition of Cecil F. Adamson, we shall move before the Supreme Court of the United States, in the city of Washington, District of Columbia, on Monday, the sixth day of March, 1916, at the opening of the court on that date, or as soon thereafter as counsel may be heard, for a *writ of certiorari*, directed to the Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court of the United States the case of Cecil F. Adamson, complainant, *vs.* David C. Gilliland, defendant, recently decided by the said United States Circuit

Court of Appeals for the Eighth Circuit, and for such further relief as in the premises may be just.

Dated at Washington, February 19, 1916.

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Counsel for Petitioner.

PERCY B. HILLS,
Of Counsel for Petitioner.

We acknowledge service of the foregoing notice and of the petition and brief accompanying the same, this 21st day of February, 1916, and agree that the service of said notice, petition, and brief is timely.

Counsel for Defendant.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Cecil F. Adamson, respectfully shows to this Court as follows:

(1.) Your petitioner brought a suit in equity in the United States District Court for the Eastern District of Wisconsin, against the C. A. Shaler Company, of Waupon, Wisconsin, for alleged infringement of his Letters Patent No. 1,057,911, for an improvement in Portable Vulcanizing Devices for Tires, granted to him April 1, 1913.

(2.) The said United States District Court, on December 17, 1913, upon full proofs taken or read in open court, decided said letters patent valid and infringed (Opinion, *post*, pp. 7-10).

(3.) No appeal from said decree was filed, and on March 30, 1914, with the consent of the defendant, a final decree declaring said letters patent valid, permanently enjoining the defendant, and fixing a sum certain to cover the damages and profits, was signed, thereby finally disposing of said suit (Decree, *post*, pp. 11-12).

(4.) Your petitioner also brought suit in equity in the United States District Court for the Eastern District of Missouri against the defendant herein, David C. Gilliland, for alleged infringement of said letters patent hereinbefore referred to.

(5.) The said United States District Court, on January 24, 1914, after full proofs taken in open court, also decreed said letters patent valid and infringed (Opinion, *post*, pp. 13-14).

(6.) The defendant, Gilliland, appealed from the decree of said District Court to the United States Circuit Court of Appeals for the Eighth Circuit.

(7.) Said Circuit Court of Appeals, on the 11th day of October, 1915, adjudged that the defendant produced the device of the patent in suit before it was invented by your petitioner, and reversed the decision of said District Court (Opinion, *post*, pp. 15-16):

(8.) In both of the suits hereinbefore referred to the defense which prevailed with the Circuit Court of Appeals for the Eighth Circuit, viz., that the defendant, Gilliland, made the device of the patent in suit before it was invented by your petitioner, was presented in the strongest possible manner, and was rejected by both district courts.

(9.) By reason of said ruling of the Circuit Court of Appeals for the Eighth Circuit, the letters patent in suit are invalid in said Eighth Circuit, but are valid in every other circuit of the United States, and particularly in the Seventh Circuit, and vulcanizers heretofore enjoined in the Seventh Circuit freely may be used and sold by the said defendant in the Seventh Circuit, and defendant threatens and intends to use and sell said vulcanizers in the Seventh Circuit.

(10.) Your petitioner avers, therefore, that if said de-

cision of the Circuit Court of Appeals is permitted to stand without review, the letters patent in question become practically of no value to your petitioner, notwithstanding that said letters patent have been held good and valid in a final decree, and without appeal, in another circuit.

(11.) Your petitioner further avers that the Circuit Court of Appeals for the Eighth Circuit committed grievous error, both in law and in fact, in holding that the letters patent in suit was invalid, to the confusion of the law, and to the great injury of your petitioner.

(12.) The validity of the letters patent in suit has been acquiesced in in other suits, notably in *Cecil F. Adamson vs. J. Everet Inmann and George Inman*, trading under the firm-name of The Victor Inner Tire & Rubber Company, in the Southern District of Ohio, western division; and in *Cecil F. Adamson vs. Samuel Lazarus*, in the Northern District of Ohio, eastern division, wherein final decrees against the several defendants have been duly signed and entered (Decrees, *post*, pp. 18-20).

A certified copy of the transcript of record as filed in the Circuit Court of Appeals for the Eighth Circuit, and all proceedings in said court, is filed herewith as a part of this petition.

Your petitioner therefore prays that this Honorable Court will grant its writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring that the record of said cause in said court be certified to this Honorable Court for its review and determination.

CECIL F. ADAMSON,
By PERCY B. HILLS,
His Attorney.

PERCY B. HILLS,
DOUGLAS W. ROBERT,
Of Counsel.

DISTRICT OF COLUMBIA, ss:

Percy B. Hills, being duly sworn, deposes and says: I am of counsel for the above petitioner; I have read the foregoing petition and know the contents thereof, and aver that the facts therein set forth are true to the best of my knowledge and belief.

Subscribed and sworn to before me this 19th day of March, 1916.

I certify that, in my opinion, the above petition is well grounded in matter of law and proper to be heard.

Of Counsel for Petitioner.

OPINION.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF WISCONSIN.

CECIL F. ADAMSON, *Complainant,*
vs.

CLARENCE A. SHALER and F. E. JONES, *Copartners, Doing Business under the Firm Name and Style of C. A. Shaler Company, Defendants.*

GEIGER, J.:

The case has been presented in a way that is rather enlightening in the way of endeavoring to reduce my conclusions to a formal opinion, but I think I will announce my conclusions now.

I am satisfied that so far as the first defence that is asserted is concerned, there is nothing in the prior art of patents, and I do not believe there is anything in the prior arts structures that discloses the Adamson structure as he has presented it at this trial. Of course, he has the benefit of a presumption that the Patent Office has accorded him. I think that presumption is strongly fortified by a detailed examination of the prior art structures, both the patent structures and others, as they have been exhibited here in court.

I do not think there is any doubt but that prior to the appearance of Mr. Adamson on the field of exploration the idea was known that a vulcanizing process could be carried on through the use of a gasoline liquid enclosed in structures similar to those which have been exhibited here, the Inman structure and the Gilliland ladle; but there is a remarkable difference in structure alone between any of these and the structure of the Adamson patent. I haven't any doubt that the Patent Office regarded the disclosure made in his applica-

tion as being entirely novel, and that his patent was readily accorded to him because of the very patent differences between all prior art structures and his; and I believe that the evidence which has been produced here respecting the receipt and acceptance of the structure in the automobile trade fortifies very strongly the presumption which the Patent Office accorded him. It may be true, as suggested by counsel, that the moment the Adamson structure was disclosed it was accepted by everyone because of the want of knowledge; that all those interested in structures of that kind and in some structures that would discharge the function immediately realized that it contained nothing new, and that it was a mere fortuitous event—the disclosure of the Adamson structure—which they were at liberty to adopt; but I think the contrary view is the one which, under the law, must be taken; that the ready acceptance of it, the eagerness to appropriate in one form or a closely allied form is very cogent evidence of its novelty; and I am clear that the patent must be sustained on that ground.

I do not believe that it is anticipated by the Inman structure, and I will pass that as being covered by what I have said.

The feature of the case disclosed by the claim of the defendant that Gilliland was the inventor, if there was invention, of this structure, is to my mind a very interesting one, and affords rather a wide opportunity, a large opportunity, for discussion of the inferences properly to be drawn. In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument respecting the improbability of its truth. As I suggested, in interrupting counsel, it may be that if Mr. Adamson's testimony is taken and analyzed closely there can be many conjectures indulged in respecting the improbability of the shaping of events; but his testimony as a whole is clear and, as I regard it, straightforward and not inherently improbable. I did

not get the impression from his testimony that the whole idea which is embodied in his patent, and which is disclosed in the sketch which is offered in evidence, and his original disclosure to the witness McCormish, that it all happened in the course of a few minutes; but I think a fair construction of his testimony, as well as that of McCormish, is that the matter had been under discussion. Adamson's profession is such, his daily activities were such, as would equip him fairly well to approach a problem of this kind. He had a fund of information, some learning on the subject, which, as between he and Gilliland, puts him in a position where what he said respecting his achievements can be quite readily accepted and without suggestion of inherent improbability.

Mr. Gilliland testifies that he first got the idea of his structure about July 25, 1911. A suggestion was made to him by the witness Huber; that he at once went to his home, where he had a hand lathe, and turned out practically the structure as here introduced in evidence to the court. I do not believe that that testimony can be accepted to the exclusion of a reasonable doubt. I believe Mr. Gilliland's own activities long prior to this time in the way of using the ladle, as he has testified, created a situation where we would naturally expect he would make a little fuller disclosure as to what he did. He is not a professional man. I should say that as between him and Mr. Adamson he was at a disadvantage in the development of any idea, whether it was his own, or suggested to him. That between the date which he gives, July 25, and August 2, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that those statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here. That I am unwilling to do, and I find against the defendant upon that ground also.

This leaves merely the question as to infringement.

I believe the defendant's structure infringes the complainant's. I think the basic idea of the complainant's structure is substantially incorporated, and whatever change may have been brought about by the use of a cap I do not believe can in any way relieve the defendants from the consequences of adopting the basic ideas of the complainant's patent. There will be a decree for the complainant.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF WISCONSIN.

CECIL F. ADAMSON, *Complainant,*
vs.

CLARENCE A. SHALER and F. E. JONES, *Copartners, Doing Business under the Firm Name and Style of C. A. Shaler Company, Defendants.*

FINAL DECREE.

This cause came on to be heard in open court at the October term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That letters patent of the United States No. 1,057,911, granted under date of April 1, 1913, to Cecil F. Adamson for Portable Vulcanizing Device for Tires, is in all respects good and valid in law, and that the title thereto is duly vested in the complainant.
2. That the defendants have infringed upon the exclusive rights of the complainant under said letters patent, by making, using and selling Portable Vulcanizing Devices for Tires embodying the form and construction described in said letters patent, and particularly set forth and claimed in the first, second, third, fourth and fifth claims of said letters patent.
3. That an injunction forthwith issue under the seal of this court, permanently enjoining and restraining the defendant, Clarence A. Shaler, and F. E. Jones, copartners, doing business under the firm and style of C. A. Shaler Company, and also their agents, workmen and employees, or their successors, from further making, using or selling, or causing to be made, used or sold, directly or indirectly, any Portable Vulcanizing Devices for Tires containing or em-

bodying the invention sold as aforesaid patented to the complainant in said letters patent No. 1,057,911.

4. The parties having agreed upon the sum of two thousand dollars (\$2,000.00) as damages and profits, and defendants having paid the same, it is ordered that the master be discharged.

5. That the complainant recover from the defendants his costs, charges and disbursements in this suit to be taxed and have execution therefor.

Enter.

(Signed)

F. A. GEIGER,
District Judge.

Filed March 30, 1914.

[Endorsed:] No. 427 Civ. Doc. United States District Court, Eastern District of Wisconsin. Cecil F. Adamson, complainant, vs. Clarence A. Shaler and F. E. Jones, co-partners, doing business under the firm name and style of C. A. Shaler Company, defendants. Certified copy. Final Decree. Filed Mar. 30, 1914. F. C. Westfahl, clerk.

OPINION.

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE EASTERN DIVISION OF THE
EASTERN JUDICIAL DISTRICT OF MISSOURI.

In Equity. No. 4198.

CECIL F. ADAMSON, *Complainant,*

vs.

DAVID C. GILLILAND, *Doing Business under the Name of*
Gilliland Auto Supply Company, Defendant.

St. Louis, January 24, 1914.

DYER, J.:

In this case, that was before a judge of the United States Court in Milwaukee, it is claimed here that Mr. Gilliland was a witness; that his deposition was taken and that he was examined orally in court.

All of his claim as to when this work was done by him was before Judge Geiger. Judge Geiger has decided the case not only upon the testimony given before him, but with the depositions of Mr. Gilliland and Mr. Huber before him. With the fact that this defendant was examined at length in that particular case (and he was examined along the lines that follow here, that matter being before Judge Geiger) he decided in favor of the validity of this patent and held not only that the presumption of law that arises in favor of the action of the parties giving the patent was controlling in a measure, but was convinced by the testimony he heard that this was a patented invention and that the patent was granted to this complainant, notwithstanding the claim made in the testimony of Mr. Gilliland.

Certain other testimony was introduced here which I am asked to say supplements Mr. Gilliland's testimony, and had

that been before Judge Geiger as it is now before this court a different ruling might have been made by Judge Geiger. I am not going into the question of this additional evidence, as it will serve no good purpose. There are some matters in this new testimony that do not favorably impress themselves. I know that a great many witnesses were examined and it is a singular thing that many of these molders and employees who were there at the time told virtually the same story one as the other, and each recollects the time about the same way each one of the others recollects it. As I have said, I am not going into a discussion of that. My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion.

My opinion, therefore, is that following the rule that has been long adopted and followed in the various courts in this country, where a claimant of a particular device is examined before the court, it becomes my duty as a judge to follow the decision of the court in the first instance. Believing that it is my duty to follow the decision of Judge Geiger, and knowing, as the record shows, that both Mr. Gilliland and Mr. Huber were examined as witnesses before that court, either orally or by deposition, I cannot say that this testimony now introduced here would have changed Judge Geiger's opinion at all.

The complainant is entitled to recover in this action. Let a decree be entered in accordance with the prayer of the bill.

OPINION.

No. 4337.

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.DAVID C. GILLILAND, *Appellant,**vs.*CECIL F. ADAMSON, *Appellee.*Appeal from the District Court of the United States for the
Eastern District of Missouri.

Submitted May 30, 1915.

Decided October 11, 1915.

Before HOOK, Circuit Judge, and Elliott and Youmans,
District Judges.YOUMANS, *District Judge:*

This is an appeal from a decree restraining and enjoining appellant, his agents, workmen, and employees, "from further making, using, or selling, or causing to be made, used, or sold, directly or indirectly, any portable vulcanizing device for tires contained in or embodying the invention patented in letters patent No. 1,057,911, dated April 1, 1913." The only question involved is one of fact, and that is whether the vulcanizing device patented by appellee was made, used, and sold by appellant prior to appellee's alleged invention.

The decree in the case of Adamson *vs.* Shaler, 208 Fed., 566, decided in the United States District Court for the Eastern District of Wisconsin, was introduced by appellee. He also introduced the testimony of appellant in that case, together with the opinion of the district judge. The decree

in that case, following the opinion, sustained the patent and enjoined Shaler from using or selling the device, which was adjudged an infringement.

The testimony of appellee shows that the idea embodied in the patent assumed shape in his mind on the 19th day of August, 1911, on which day he made a drawing of the different parts constituting the vulcanizer, the subject of his patent. The appellant introduced testimony to the effect that as early as August 7, 1911, he had caused vulcanizer castings to be made in practically the same form as those set out in appellee's application for a patent, and that prior to the 19th day of August of that year appellant had sold vulcanizers embodying all the elements of appellee's patent. That testimony is not disputed in any essential particular. It contains no inherent improbabilities.

The lower court held that it was bound by the decree of the United States District Court for the Eastern District of Wisconsin rendered in another case. The parties were entitled to a judgment based upon the facts as they were developed in this case. Those facts demonstrated beyond a reasonable doubt that the appellant used and sold a vulcanizer embodying all the features contained in appellee's patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind.

Therefore the decree of the lower court must be reversed, with direction to dismiss appellee's bill.

DISTRICT COURT OF THE UNITED STATES, SOUTH-
ERN DISTRICT OF OHIO, WESTERN DIVISION.

TUESDAY, June 30, 1914.

Present: Honorable Howard C. Hollister, district judge.

In Equity. No. 2191.

CECIL F. ADAMSON

v/s.

J. EVERETT INMAN and GEORGE INMAN, *Trading under the Firm Name of The Victor Inner Tire and Rubber Company.*

FINAL DECREE.

This cause coming on to be heard on this 30th day of June, 1914, upon consideration thereof, the parties having agreed upon the entry of a final decree, it is ordered, adjudged, and decreed:

(1) That letters patent of the United States granted April 2, 1912, No. 1,022,289, to Cecil F. Adamson, complainant herein, for new and useful improvements in a tire-vulcanizing repair apparatus, is, as between the parties, in all respects good and valid in law as to claims 1, 2, 3, and 4 thereof; and that letters patent of the United States granted April 1, 1913, No. 1,057,911, to Cecil F. Adamson, complainant herein, for new and useful improvements in a portable vulcanizing device for tires, is, as between the parties, in all respects good and valid in law as to claims 1, 2, 3, 4, 5, 7, 8, and 9 thereof.

(2) That Cecil F. Adamson was the true and original inventor thereof, and has a good and sufficient title thereto, and is entitled to the exclusive rights therein, including

the right to recover for any and all claims and demands for profits and damages arising from infringement of the letters patents aforesaid.

(3) That defendants, J. Everett Inman and George Inman, trading under the firm name of the Victor Inner Tire & Rubber Company, copartners, having their principal place of business in the city of Dayton and State of Ohio, have infringed upon said letters patents and upon the exclusive rights of complainant thereunder by selling vulcanizers made according to and containing the inventions and improvements described in said letters patents and pointed out in claims 1, 2, 3, and 4 of letters patent 1,022,289 and in claims 1, 2, 3, 4, 5, 7, 8, and 9 of letters patent 1,057,911, as evidenced by the open-faced vulcanizers filed herewith and marked respectively Exhibits A, B, and C.

(4) That defendants, J. Everett Inman and George Inman, trading under the firm name of the Victor Inner Tire & Rubber Company, their officers, agents, attorneys, servants, and workmen, and each and every one of them, be and they are hereby perpetually enjoined and restrained from further infringement of said letters patents Nos. 1,022,289 and 1,057,911, by making, using, vending, or causing others to make, use, or vend, within the United States or the territories or possessions thereof, vulcanizers containing or embodying the combinations of parts set forth in said letters patents and pointed out in claims 1, 2, 3, and 4 of letters patent 1,022,289 and in claims 1, 2, 3, 4, 5, 7, 8 and 9 of letters patent 1,057,911.

(5) The parties hereto having agreed regarding the complainant's claims for profits and damages, complainant here releases defendants from all claims for profits and damages, including all claims against purchasers of the aforesaid infringing vulcanizers heretofore sold by defendants; and de-

fendents having waived their right to an appeal from this decree, it is hereby so adjudged and decreed.

(6) It is further ordered, adjudged, and decreed that complainant recover from said defendants his costs in said suit, to be taxed by the clerk, and that complainant have execution therefor.

HOWARD C. HOLLISTER, *Judge.*

Approved:

R. J. McCARTY,
Solicitor for Defendants.

FINAL DECREE.

October Term, A. D. 1914, to wit, January 2, 1915.

Present: Honorable John H. Clarke, United States district judge.

No. 194. Equity.

CECIL F. ADAMSON

vs.

SAMUEL LAZARUS, Doing Business under the Name of Lazarus Manufacturing Company.

And now, this 31st day of December, 1914, the defendant having consented that a decree may be entered *pro confesso* in this cause that the letters patent sued upon are valid, that they are owned by the complainant, and that they have been infringed by the said defendant; and the parties hereto having made an agreement providing for the settlement of the costs of the suit and of all other obligations in connection therewith, the court thereupon

ADJUDGES AND DECREES that the allegations of the bill are, by reason of the consent of said defendant, confessed to be true, so far as this defendant is concerned.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the preliminary injunction issued in this cause on the 24th day of March, 1914, be and the same is made hereby perpetual for and during the remainder of the terms of said letters patent.

[Endorsed:] No. 194. United States District Court, Northern District of Ohio, Eastern Division. Cecil F. Adamson *vs.* Samuel Lazarus *et al.* Copy of Final Decree. Filed January 2, 1915. B. C. Miller, clerk.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

IN THE MATTER OF THE PETITION OF CECIL F. ADAMSON FOR A WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO BRING BEFORE THIS COURT THE CASE OF CECIL F. ADAMSON, COMPLAINANT, *vs.* DAVID C. GILLILAND, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI.

BRIEF.

This petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit is asked in this case for the purpose of securing uniformity of decisions in the several circuits.

As shown by the petition, the patent in suit now stands as valid in the Seventh Circuit, after a full trial in open court in the Eastern District of Wisconsin, and as valid in the Sixth Circuit, as evidenced by the consent decrees entered in the Southern District of Ohio, Western Division, and in the Northern District of Ohio, Eastern Division, while in the Eighth Circuit, by reason of a finding of the Circuit Court of Appeals of said circuit, the patent in suit stands therein as invalid.

It is understood by counsel that it is the practice of this Honorable Court to issue its writ of certiorari in cases where there are conflicting decisions in the Circuit Courts of Appeals of two circuits.

Steward vs. American Lava Co., 215 U. S., 161.

It is true that the conditions in the present case differ slightly from those in the case above cited, in that there has been no finding of a Circuit Court of Appeals declaring the patent in suit to be valid, but this is through no fault or negligence of your petitioner. No opportunity has been offered your petitioner to submit the case to any Circuit Court of Appeals, through an appeal by your petitioner, for the reason that each finding in the district courts wherein proofs were taken has been in favor of the validity of the patent in suit, and in such other suits as have been brought no defense has been offered, and final decrees in favor of the patent in suit have been entered, either by consent or by reason of failure to defend. By reason of this state of facts, your petitioner has been precluded from bringing the question of the validity of the patent in suit before any of the Circuit Courts of Appeals, and inasmuch as the status of the patent in suit, by reason of the conflict of decisions that now exists, is the same as that which existed in *Steward vs. American Lava Co.*, *supra*, it is felt that this Honorable Court would be warranted in issuing its writ of certiorari.

Identity of Defense in Contested Suits.

In the trial of the suit, *Adamson vs. The Shaler Co.*, in the Eastern District of Wisconsin, the defense was offered, and was strongly urged, that the defendant in this suit, David C. Gilliland, produced the article embraced by the patent before the same was invented by your petitioner. Furthermore, while the testimony as to this alleged prior production was not taken in open court, but was taken before a special examiner under the statutes, this defendant, David C. Gilliland, was produced in open court and was personally interrogated by the trial judge, Honorable Ferdinand A. Geiger. As is seen from the opinion of the court in that case (*ante*, p. 8), the learned judge had no hesitancy in expressing his views as to the improbability of the truth of the story told by this defendant, in the following language:

"In the giving of Mr. Gilliland's testimony, I was impressed, and that impression, and the conviction, has not been shaken by anything which has been said here in argument respecting the improbability of its truth."

This decided expression of opinion by a United States District Judge, after an opportunity personally to interrogate the witness necessarily should have great weight, and in fact it is believed that had that case been taken to the United States Circuit Court of Appeals for the Seventh Circuit the finding of the district judge on this point would have been accepted as conclusive.

In *Davis vs. Schwartz*, 155 U. S., 636, Mr. Justice Brown, in stating the opinion of the court, held as follows:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, *or upon the credibility of witnesses*, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." (Italics ours.)

So, also, in *Kimberly vs. Arms*, 129 U. S., 512, the court held as follows:

"Its (the court's) findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given the evidence, or in the application of law, but not otherwise."

And this rule has been followed by the Circuit Courts of Appeals as shown by the ruling of the court in *Cook v. Robinson*, 194 F., 759, where the court stated as follows:

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Prior to the adoption by the Supreme Court of the present new equity rules, testimony in equity cases was taken out of court, reduced to writing, and presented for the court's consideration, to find the facts as well as the law. Upon appeal the complete record was sent up and the Court of Appeals had the same opportunity and identically the same evidence as did the lower court upon which to predicate its judgment. But under the new equity rules, whereby causes are tried in open court and the witnesses are before the judge for him to pass in person upon their credibility, equity cases take on a different aspect, in that while the trial judge has every opportunity to pass upon the credibility of the witnesses, the Court of Appeals is even less able than heretofore properly to weigh the same, in that under the new rules the transcript is not even a complete reproduction of the evidence, but is a brief of the same.

It would seem to follow, therefore, that the rule as laid down in the opinions hereinbefore quoted now should apply with equal force to questions of fact in equity cases as passed upon by the trial judge. He alone confronts the witnesses, and he is far better able to pass upon their credibility than would be a court of appeals, wherein a mere brief of the evidence given is submitted for consideration. We feel, therefore, that by analogy to the practice in the consideration of a master's findings and by analogy to the practice in the consideration of findings of a lower court without reference to a

jury as to questions of fact, the findings of fact of the court below, where all the witnesses have appeared before him and have given their testimony orally, should not be questioned.

The trial of the suit against this defendant followed closely the conclusion of the trial in the eastern district of Wisconsin hereinbefore referred to, and the learned judge, the Honorable David P. Dyer, in the eastern district of Missouri, in rendering his opinion from the bench, and in commenting upon the fact that while the same defense as presented in this case had been made before Judge Geiger in the eastern district of Wisconsin, still certain additional evidence had been offered before Judge Dyer, expressed himself in respect to such additional evidence in the following language:

"My own judgment is that had all of this new testimony been before Judge Geiger at the time he decided the case, it is not of such character as would change Judge Geiger's opinion" (*ante*, p. 14).

It seems to follow, therefore, that with the positive opinion of two trial judges before whom the testimony of this defendant was presented orally, and who had opportunity to judge of his credibility through personal observation, the doctrine laid down in *Davis vs. Schwartz*, and the other citations hereinbefore referred to should prevail.

Error in Fact by Court of Appeals.

While possibly not pertinent to the present petition, still your petitioner feels constrained to call the attention of this honorable court to the fact that in its opinion in this cause the United States Circuit Court of Appeals for the Eighth Circuit committed a grievous error of fact in its finding as to the evidence. Said court held as follows:

"Those facts demonstrated beyond a reasonable doubt that the appellant used *and sold* a vulcanizer embodying all the features contained in appellee's

patent, not only before the patent was issued, but even before the idea became definitely formed in appellee's mind." (Italic type ours.)

This is a plain error of fact, in that neither in the testimony on behalf of the defendant Gilliland, nor in the brief presented by his counsel, is there any showing or contention that the defendant Gilliland sold one of said vulcanizers prior to the 19th day of August, 1911, the date when your petitioner first disclosed the invention to others. In fact, there is nothing in the evidence or in the brief for defendant claiming that the defendant Gilliland sold one of his vulcanizers before your petitioner had reduced the invention to practice.

Conclusion.

It is submitted that unless the errors of fact and law hereinbefore referred to are corrected by this Honorable Court great confusion to the public will result because of this conflict of decisions, and your petitioner will be unable to determine what his rights are in the premises. Over a million of these articles covered by the patent in suit have been sold in the last four years, and your petitioner, believing that his right to the patent had been determined, has invested large sums in exploiting the article before the public, all of which labor and expense has been rendered nugatory by the decision of the United States Circuit Court of Appeals for the Eighth Circuit, said decision leaving this defendant, Gilliland, under the decision of your Honorable Court, in Kessler *vs.* Eldred, 206 U. S., 285, free to sell the article in the seventh circuit notwithstanding that said patent has been held to be valid in said circuit.

Respectfully,

PERCY B. HILLS,
DOUGLAS W. ROBERT,

Counsel for Petitioner.

